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ALEXANDER L. STEVAS,
CLERK

NO. 80-1297

In the Supreme Court of the United States

OCTOBER TERM,

JACQUELINE MARCELLO DUGAS,
Petitioner
VERSUS
JERRY W. KELLY,
Respondent
Consolidated with
CARLOS MARCELLO,
Respondent

PETITION OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

J. THOMAS NELSON
RICHARD G. VINET
144 ELK PLACE, SUITE 1202
NEW ORLEANS, LOUISIANA 70112
(504) 568-9281

FOR THE PETITIONERS

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

Whether an appellant, whose appeal was dismissed on the procedural grounds of failure to order a transcript may plead the lack of finality and appealability of the district court judgment as alternate and preferable grounds for dismissal of the appeal.

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OPINIONS BELOW

The decrees and opinions herein are all unreported. The findings of fact and conclusions of law of the District Court are reprinted at A.-2 and A-9 *infra*. The partial judgment of the District Court is reprinted at A.-13 *infra*, the orders of the Fifth Circuit are reprinted at A.-13 and A.-24 *infra*.

JURISDICTION

The order of the Fifth Circuit denying reinstatement of petitioner's appeal was issued November 3, 1980.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254 (1), and this petition is filed within 90 days of rendition of said order, pursuant to 28 U.S.C. Sec. 2101 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The judicial Power shall extend to all cases in Law and Equity . . . between citizens of different States . . . .

U.S. Const. Art. III Sec. 2 (1789)

B. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

28 *U.S.C.* Sec 1254 (1) (1948)

C. . . . (A)ny writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within *ninety days* after the entry of such judgment or decree . . . .

28 *U.S.C.* Sec 2101 (c) (1948, *emphasis supplied.)*

D. When more than one claim for relief is presented in an action, whether as a counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties *only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment.* In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the

the parties *shall not terminate the action as to any of the claims or parties . . . .*

F.R. Civ. P. 54(b) (1961 emphasis added)

STATEMENT

This diversity action was filed by plaintiff, Jerry W. Kelly, a resident of Missisippi, to remove a cloud from title and for damages for slander of title against Jacqueline Marcello Dugas, a Louisiana resident.

Thereafter the second consolidated action was brought against Carlos Marcello, father of Mrs. Dugas,and a resident of Louisiana, likewise seeking damages for slander of title.

Mrs. Dugas thereafter conterclaimed for a declaratory judgment, partition of the subject property and an accounting.

At issue is title to a forty acre tract of land located near New Orleans, and the dispute arises from an oral agreement between plaintiff Kelly and defendant Carlos Marcello relative to the acquisition and development of the property as a residential subdivision.

The agreement, entered into in late 1972 or early 1973 involved Kelly taking title to the property and developing it with Marcello as a silent partner providing or facilitating the provision of funds and financing.

At Marcello's request, the benefits of the project were to go to his daughter Jacqueline, and this was evidenced by a document called a counterletter which purported to recognize an undivided one-half interest in the property as belonging to Jacqueline Marcello, now wife of Preston J. Dugas.

Thereafter, in late 1977 the counterletter was recorded in the public records of Jefferson Parish Louisiana, situs of the property, thereby becoming a cloud upon Kelly's theretofore sole record ownership of the property and engendering the lawsuit.

By joint stipulation, a trial was held upon the limited issue of liability, to-wit: the validity of the counterletter and thereafter a "partial judgment" on the question of liability.

The judgment, reprinted at A.13 was adverse to Mrs. Dugas and Mr. Marcello.

Thereafter, petitioners filed and docketed an appeal from said judgment in the United States Court of Appeals for the

Fifth Circuit. A few weeks later, the appeal was dismissed for appellant's failure to arrange for payment of the transcript and for lack of prosecution, under F.R. App. P. 10(b)(4) and Rule 9-2-2 of the local rules of the Fifth Circuit. Petitioners' motion to reinstate (A. -21) was thereafter denied (A.- 24) and petitioners have sought this writ.

REASONS FOR GRANTING THE WRIT

The Judgment of the district court was not an appealable judgment. By its terms it was a "Partial judgment" limited to the issue of liability. The judgment is not certified as required by Rule 54(b) of the Federal Rules and it does not determine all of the claims raised in the suit. The matter is still carried on the active docket of the district court for the very reason that no final judgment has been rendered in the case.

Accordingly no appeal lies from this judgment, and appellate jurisdiction did not attach by virtue of petitioner's notice of appeal.

In 1804 this court established the principal that a party may assign for error, the lack of jurisdiction in the court to which he has resorted. *Capron v Van Noorden* 6 U.S. (Z. Cranch.) 126 (1804).

Counsel has no quarrel with the dismissal of his abortive appeal, but respectfully petitions the Court to grant such dismissal on grounds of prematurity and/or lack of jurisdiction rather than for want of prosecution and failure to order the transcript.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari issue herein to vacate the prior dismissal of this appeal and to enter an order dismissing the appeal for prematurity and /or lack of jurisdiciton.

Respectfully submitted,

NELSON, NELSON & KOCH, LTD.
A Professional Law Corporation

J. Thomas Nelson
Richard G. Vinet
Attorneys for Petitioners
144 Elk Place, Suite 1202
New Orleans, Louisiana 70112
Telephone (504) 568-9281

CERTIFICATE

I, RICHARD G. VINET, do hereby certify that I am a member of the Bar of this Court and that I did on the 30th day of January hand deliver three copies of the abovegoing petition for certiorari to Mr. Robert J. Skinner, Esq., 225 Baronne Street, New Orleans, Louisiana, counsel for respondent and that all parties required to be served have been served.

New Orleans, Louisiana, this 30th day of January, 1981.

_____

Richard G. Vinet

United States District Court
Eastern District of Louisiana

JERRY W. KELLY	CIVIL ACTION
versus	NO. 78-726
JACQUELINE MARCELLO DUGAS	SECTION L

Consolidated with:

JERRY W. KELLY	CIVIL ACTION
versus	NO. 78-4227
CARLOS MARCELLO	SECTION L

These consolidated actions were brought by the plaintiff to remove a cloud on his title of certain immovable property which allegedly resulted from the filing of a counter-letter. Plaintiff seeks in effect, to have the notarial act conveying a ½ interest in the property dissolved and to recover damages for slander of title. A counter-claim was filed by defendant, Mrs. Dugas, asking the Court to declare the counter-letter valid, for an accounting and partition by licitation.

By joint motion of the parties, the validity of the counter-letter was tried separately form plaintiff's claim for damages and from Mrs. Dugas' claims for an accounting and partition.

After considering the pleadings, the evidence adduced at trial and the law applicable to this case, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff, Jerry W. Kelly is a citizen of the State of Mississippi. Defendants, Jacqueline Marcello Dugas and her father, Carlos Marcello, are citizens of the state of Louisiana.

2. Defendant, Preston J. Dugas, husband of Mrs. Dugas, was dismissed by stipulation of counsel since the acquisition of the property and the events involved in these proceedings predate the marriage.

3. In 1972, Carlos Marcello unsuccessfully attempted to purchase a forty-acre tract of undeveloped land in Waggaman, Louisiana (hereinafter referred to as Forest Acres Estates) for $3,500.00 per acre. (Testimony of Marcello; Kelly)

4. In mid 1972, Carlos Marcello discussed with Kelly the acquisition, the development, and marketing of Forest Acres Estates. Initially, Kelly told Marcello that because of his financial condition, he was in no position to undertake a project of such magnitude, however, following further discussions, an oral

agreement was reached whereby Carlos Marcello agreed to provide all financing in connection with the purchase and development of Forest Acres Estates in return for 50% interest, and Kelly was to take title solely in his name and to develop and market the property. Additionally, Marcello wanted his daughter, Jacqueline Marcello Dugas (then unmarried and known as Jacqueline Mary Marcello) to have the benefit of any profit realized from the project. (Testimony of Kelly, Marcello and Mrs. Dugas)

5. Kelly's offer of November 10, 1972 to purchase the property for $4,000.00 per acre was accepted by the landowner, the Sisters of the Society of St. Theresa of Jesus. (Kelly Exhibit No. 1; Testimony of Kelly)

6. Pursuant to the oral agreement, and operating under the belief that Marcello had already contacted the Merchant's Bank and Trust Company to provide financing for the project, Kelly procured 100% financing from the bank. Kelly spent full-time on the project, drawing up plans and getting the approval of the various parish agencies. On February 9, 1973, Kelly took title to the land in his own name in consideration of $160,000.00, subject to a first mortgage held by the Merchant's Bank. (Testimony of Kelly; Kelly Exhibit No. 4)

7. Following the purchase of the property, and at the request of Vincent Franzone, then Senior Vice President and member of the Board of Directors of the Merchant's Bank, Kelly prepared and submitted to him a cost analysis for offsite improvements to the land. Franzone then instructed Kelly to commence improvements and a collateral mortgage was issued to secure future advances to be made. (Kelly Exhibit No. 5; Testimony of Kelly and Franzone)

8. On February 14, 1973, Kelly, at the request of Marcello's attorney, appeared at the office of A. J. Grafagnino, Notary Public, and signed the counter-letter which is at issue in this case. Mrs. Dugas was not present and did not sign the document until some time later. (Testimony of Kelly and Mrs. Dugas)

9. The counter-letter recited that Jerry Kelly paid the entire purchase price of the property, that Jacqueline Marcello Dugas owned an undivided one-half interest in the porperty, and that when called upon, Kelly would convey to Miss Marcello her undivided one-half interest. Although the counter-letter provided that, when called upon Kelly, Miss Marcello would bind herself jointly and severly with Kelly on any up paid portion of the remaining indebtedness due on the property and that she was obligated to pay one-half of all costs in connection with the sale and/or development of the property, Mrs. Dugas testified

that her father had told her that he would put her in the real estate business and he would underwrite her portion of the finances. (Kelly Exhibit No.6)

10. Approximately two weeks after Kelly obtained the initial loan from the Merchant's Bank, and after Kelly had incurred development expenses in the amount of $29,000.00, Mr. Franzone advised Kelly that the bank could not finance the project and his present indebtedness would have to be extinguished or the bank would call the loan. (Testimony of Kelly and Franzone)

11. Kelly, believing that Marcello had arranged the financing, immediately went to Marcello explaining that the bank had called the loan. Kelly testified that Marcello advised that he could not produce such a vast amount of money; he did not know where he could find such an amount and suggested that Kelly seek financing from another lending institution. Marcello on the other hand testified that he told Kelly that he didn't have any other banks (other than the Merchant's Bank) but that if Kelly obtained financing from another lending institution, he would be willing to co-sign the note.

12. On March 21, 1973, Kelly again sought financing from Marcello. Although Marcello did nothing to obtain a refinancing of the loan, he did issue a check payable to Kelly in the

the amount of $358,000.00 This loan was used to extinguish the mortgage held by the Merchant's Bank and the difference placed in escrow for offsite improvements to Forest Acres Estates. (Testimony of Kelly and Clarence P. Weggmann, then Vice President of the NBC; Kelly exhibits No. 21 thru 24)
a promissory note for each check advanced to him by Marcello. (Testimony of Kelly and Marcello; Kelly Exhibits No. 7 thru 20)

13. After Marcello had refused to help obtain a refinancing of the loan, Kelly, being of the opinion that the oral contract had been rescinded by the parties, requested the return of the counter-letter. Although the counter-letter was in his daughter's safety deposit box, Marcello told Kelly that he did not know of its whereabouts but, upon its discovery it would be returned. At any rate, Kelly testified that Marcello advised him "not to worry" that the counter-letter would be returned. (See testimony of Kelly and Mrs. Dugas)

14. In June of 1973, Kelly, without any assistance from Marcello, obtained a loan from the National Bank of Commerce in Jefferson Parish (hereinafter referred to as the NBC) in the mortgage held by the Merchant's Bank and the difference placed in escrow for offsite improvements to Forest Acres Estates. (Testimony of Kelly and Clarence P. Wegmann, then Vice President of the NBC; Kelly Exhibits No. 21 thru 24)

15. Kelly encountered difficulty in paying the notes on the loan, and was required to make additional loans from the NBC to meet delinquent interest payments. (Kelly Exhibits No. 26 thru 28)

16. In 1974, Kelly finished the project, but did not begin selling any improved lots until 1975, after he had built houses on some of the lots to generate interest. The proceeds from these sales were used to pay off the loans to the bank. (Testimony of Weggmann and Kelly; Kelly Exhibits 26 thru 28)

17. In 1978, Marcello discovered that Kelly was a defendant in a law suit concerning a fire on property owned by Kelly. Upon counsel's advice and in order to protect his daughter's interest in the property, Marcello had the counter-letter recorded in the Conveyance Office of the Clerk of Court for the Parish of Jefferson, COB 914, Folio 904. (Testimony of Marcello)

18. From the evidence adduced at trial, the Court finds that the consideration described in the counter-letter is in fact not the true consideration agreed upon. The true consideration upon which Kelly relied in entering into the contract was the assurance by Carlos Marcello that he would fund the entire Forest Acres Estates Project in exchange for Kelly handling not only the purchase, but the development and marketing of the project.

19. From the evidence adduced at trial, the Court finds that Carlos Marcello failed to discharge his obligations under the oral contract entered into with Kelly. Both Franzone and Weggmann testified that Kelly obtained the loans from the Merchant's Bank and the NBC without any assistance from Marcello; Marcello did not contact them nor did he supply any security for the loans. Additionally, when Kelly called upon Marcello to finance the project after the loan had been called by the Merchant's Bank, Marcello did not rely upon his excellent credit rating with various banks in the community but merely provided checks to Kelly totaling $17,500.00.

20. From the evidence adduced at trial, the Court finds that the checks advanced to Kelly by Marcello were not capital contributions to the project, but were merely personal loans secured by promissory notes, payable on demand.

21. Failure of Carlos Marcello to perform his obligations under the oral agreement gave rise to an implied resolutory condition, sufficiently serious in degree to justify dissolution of any contract in existence between Kellyand Carlos Marcello or Jacqueline Marcello Dugas.

22. From the evidence adduced at trial, the Court finds that Marcello's definitive failure to perform his promise was an active breach of the oral contract, thus Kelly had no obligation to formally put Marcello in default.

CONCLUSIONS OF LAW

1. This Court has jurisdiction and venue is proper. 28 USC 1332.

2. Under Louisiana law, the verity of authentic acts of sales of immovable property may be assailed by a counter-letter La. C.C. Art. 2239; *Charles Tolmas v. Bressler,* 90 So 2d 55 (La. 1956)

3. A counter-letter is an agreement to recovery property conveyed by absolute deed. It is an instrument which defeats the force or operation of some other deed of an estate. *Karcher v. Karcher,* 70 So 228 (La. 1915)

4. Cause is the consideration or motive for entering into contract. La. CC Art. 1896 and an obligation without a cause a contract. La. CC Art. 1896 and an obligation without a cause can have no effect. La. CC Art. 1823; *Dufrene v. Tracy,* 94 So

5. Under Louisiana law, every transfer of immovable property must be in writing. La. CC A 2275

6. Although parol evidence cannot be admitted "against or beyond" what is contained in a written transfer of immovable property, such as the counter-letter at issue, as between the parties, it is admissable to show breach of contract

as well as motive or the true consideration for the execution of the contract. La. CC Art. 2276; *Andrew Development Corp. v. West Esplanade Corp.*, 347 So 2d 210 (La. 1977); *Delcambre v. Dubois,* 236 So 2d 249 (La. App. 3 - 1970); *Williams v. Carter,* 344 So 2d 113 (La. App. 2 - 1977)

7. Parol is also admissible to show want or failure of consideration, or that the instrument is but a part of an entire oral agreement. *Gulf States Finance Corp. v. Airline Motors Auto Sales, Inc.*, 181 So 2d 36 (La. 1965); *Gautreau v. Modern Finance Co. of Gonzales,* 357 So 2d 871 (La. App.1 - 1978); *McCarthy v. Plaisance,* 286 So 2d 454 (La. App.1 - 1974); *Paige v. Pecoraro,* 48 So 2d 662 (La. App Orleans - 1950)

8. Commutative contracts are those in which what is promised by one party is considered as consideration for what is promised by the other. La. CC Art 1768

9. The counter-letter is merely a part of the oral agreement entered into between Carlos Marcello and Jerry Kelly. The true consideration for Kelly's agreement to convey a ½ interest in the property to Marcello's daughter was Marcello's promise to provide financing for the project.

10. Failure of Marcello to discharge his obligations constituted a breach of the contract. La. CC Art. 1926; *Sound /City Recording Corp. v. Salberg,* 443 F. S. 1374 (W.D. La. 1978)

11. In commutative contracts, failure of a party to perform a promise constitutes an implied resolutory condition giving rise to an action by the other party to dissolve the contract. La. CC Art 2046; *Champagne v. Travelers Ins. Co.*, 276 So 2d 914 (La. App 4 - 1973); *Moore v. Sucher*, 102 So 2d 459 (La. 1958)

12. A dissolving condition is one which when accomplished operates as a revocation of the obligation, placing matters in the same state as though the obligation had never existed. La. CC Art 2045, *Sound/City Recording Corp. v. Salberg*, supra.

13. The funding of the project was the primary cause for Kelly's agreement. Marcello's breach was so substantial and fundamental as to defeat the objective of the parties in making the contract. Under these conditions, dissolution rather than specific performance is justified. *Makofsky v. Cunningham*, 576 F. 2d 1223 (5th Cir. - 1978); *Waseco Chemical and Supply Co. v. Bayou State Oil Corp.*, 371 So 2d 305 (La. App 2 - 1979), writs denied 374 So 2d 656; *Sound/City Recording Corp. v. Salberg*, supra; *Henry v. Hodges*, 323 So 2d 207 (La. App 1 - 1975)

14. Under Louisiana law, the party complaining of the breach may not seek dissolution or damages without first putting the other party in default. (La. CC Art 1912). However, where there is an active violation of the contract, no formal putting in default is necessary. La. CC Art 1932; *Andrew Development Corp. v. West Esplanade Corp.*, supra; *Johnson v. Thompson*, 229 So 2d 131 (La. App 4 - 1969); *Jones v. Whittington*, 171 So 2d 764 (La. App 2 - 1965)

15. In CA 78-726, let judgment be entered in favor of plaintiff, Jerry Kelly and against the defendant, Jacqueline Marcello Dugas, ordering that the counter-letter be erased. On the counter-claim, let judgment be entered in favor of defendant, Jerry Kelly and against plaintiff in counter-claim, Jacqueline Marcello Dugas, dismissing said counter-claim at her costs.

16. In CA 78-4227, let judgment be entered in favor of plaintiff, Jerry Kelly and against defendant, Carlos Marcello, dissolving the contract between them.

New Orleans, Louisiana, this 15th day of July, 1980.

/S/ Veronica D. Wicker

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JERRY W. KELLY	CIVIL ACTION
VERSUS	NO. 78-726
JACQUELINE DUGAS	SECTION: L
CONSOLIDATED WITH	
JERRY W. KELLY	CIVIL ACTION
VERSUS	NO. 78-4227
CARLOS MARCELLO	SECTION: L

PARTIAL JUDGMENT

On a previous day, this matter was brought before the Court on the issue of liability in a non-jury trial. After considering the pleadings, the evidence adduced at trial and the law applicable to this case, the Court issued its Findings of Fact and Conclusions of Law. Accordingly,

In Civil Action No. 78-726, IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Jerry W. Kelly, and against defendant, Jacqueline Dugas, ordering that the counter-letter be erased.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that on the counterclaim there be judgment in favor of defendant in counterclaim, Jerry W. Kelly, and against

plaintiff in counterclaim, Jacqueline Dugas, dismissing said counterclaim at her costs.

In Civil Action No. 78-4227, IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Jerry W. Kelly, and against defendant, Carlos Marcello, dissolving the contract between them.

New Orleans, Louisiana, the 15 day of July, 1980.

/S/ Veronica D. Wicker
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-3758

JERRY W. KELLY,
Plaintiff-Appellee,

versus

JACQUELINE DUGAS, Wife of
Preston J. Dugas, Jr.,
and CARLOS MARCELLO,
Defendant-Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana

CLERK'S OFFICE:

Pursuant to the Federal Rules of Appellate Procedure 10(b) (4), the appeal was duly entered dismissed for want of prosecution for failure of the appellant to make arrangements

for payment of the transcript within the time fixed by the rules, this 10th day of October, 1980.

GILBERT F. GANUCHEAU
Clerk of the United States Court
of Appeals for the Fifth Circuit

By_____
Deputy Clerk
FOR THE COURT - BY DIRECTION

October 13, 1980

Honorable Gilbert F. Ganucheau
Clerk, United States Court of Appeals
Fifth Circuit
500 Camp Street
New Orleans, LA 70130

Re: 80-3758 - Jerry W. Kelly vs. Jacqueline Dugas and Carlos Marcello

Dear Sir:

Enclosed please find the Appeal Information Sheet in reference to the above appeal.

I indicated to your office by phone last Tuesday, October 7, 1980, that I had been unable as yet to contact my client, Mr. Marcello, relative to authorizing me to order the transcript in this matter.

I would ask for an additional seven days or until, Monday, October 20, 1980, for the purpose of securing his authorization.

Failing to obtain the same by that time, it would appear that dismissal of this appeal should be entered.

With kind regards, I am,

Very truly yours,

Richard G. Vinet

RGV:gm

CC: Mr. Carlos Marcello

October 20, 1980

Ms. Janie Rodocker
Official Court Reporter
United States District Court
For the Eastern District of Louisiana
500 Camp Street
New Orleans, Louisiana 70130

Re: Jerry W. Kelly v Jacqueline Dugas and Carlos Marcello
United States Court of Appeals No. 80-3758 (La.)

Dear Ms. Rodocker:

This will confirm our telephone conversation of today October 20, 1980 wherein I advised that my client, Mr. Marcello wishes to order from you the transcript of proceedings in the above captioned matter which was tried before Judge Wicker on Monday, March 3, 1980.

I will provide you with an official purchase order form not later than tomorrow, Tuesday, October 21, 1980.

With kindest regards, I remain,

Very truly yours,
NELSON, NELSON & KOCH, LTD.
/S/ Richard G. Vinet
BY: Richard G. Vinet

RGV/mbg

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JERRY W. KELLY,
Plaintiff-Appellee

NUMBER: 80-3758 (La.)

versus

JACQUELINE DUGAS AND
CARLOS MARCELLO
Defendants-Appellants

MOTION TO REINSTATE APPEAL

NOW COME Jacqueline Dugas and Carlos Marcello, defendants-appellants herein, who, through their undersigned counsel, respectfully represents that:

I

On or about Tuesday, October 7, 1980, undersigned counsel on behalf of defendants-appellants spoke by phone to personnel at the office of the Clerk of Court for the Fifth Circuit advising that he had been unable to get in touch with his clients in order to obtain authorization to order the transcript of proceedings below, and by telephone requested the Clerk to forbear for a few more days to permit counsel to contact his client.

II

On Friday, October 10, 1980, counsel had still been unable to reach his client, Mr. Marcello, and accordingly on that date dictated the letter attached hereto to the Honorable Gilbert F. Ganucheau formally requesting an extension of time until and through October 20, 1980 for the purpose of seeking such authorization.

III

This letter was typed and went out in the mail on Monday, October 13, 1980.

IV

Unknown to counsel, this matter was dismissed for failure to prosecute on Friday, October 10, 1980, and the letter requesting an extension to the 20th crossed in the mail with the notice of dismissal issued by the Court.

V

Had counsel known that his informal extension of Tuesday, October 7, 1980 would run out on Friday, October 10,

1980, he would have hand carried the letter of October 13, 1980 in order to insure that the time granted was until October 20, 1980.

VI

As of October 20, 1980, counsel has obtained authorization from his client and has proceeded to order the transcript in order that the appeal may be prosecuted.

WHEREFORE, mover respectfully prays that, for the above going reasons this appeal be reinstated on the docket of this Court, as all requirement of Rule 10 for the Federal of Appellate procedure have now been complied with.

Respectfully submitted:
NELSON, NELSON & KOCH, LTD.

BY:_____

J. THOMAS NELSON
RICHARD G. VINET
144 ELK PLACE, SUITE 1202
NEW ORLEANS, LA 70112
TELEPHONE: 568-9281

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-3758

JERRY W. KELLY,
Plaintiff-Appellee,
versus
JACQUELYN DUGAS, wife of
Preston J. Dugas, Jr. and
CARLOS MARCELLO,
Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana

ORDER:

IT IS ORDERED that appellants' motion to reinstate the appeal is DENIED.

/S/ Sam W. Johnson
UNITED STATES CIRCUIT JUDGE

80-1297
NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Jacqueline Marcello Dugas,
Petitioner

versus

Jerry W. Kelly,
Respondent

Consolidated with

Carlos Marcello,
Respondent

ON PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROSS P. LaDART
3720 Westbank Espressway
Harvey, LA 70058
(504) 347-6241

ROBERT J. SKINNER
2201 Veterans Boulevard
Metairie, LA 70002
(504) 581-1711

FOR THE RESPONDENT

NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Jacqueline Marcello Dugas,
Petitioner

versus

Jerry W. Kelly,
Respondent

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Carlos Marcello,
Respondent

ON PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROSS P. LaDART
3720 Westbank Espressway
Harvey, LA 70058
(504) 347-6241

ROBERT J. SKINNER
2201 Veterans Boulevard
Metairie, LA 70002
(504) 581-1711

FOR THE RESPONDENT

QUESTIONS PRESENTED

1.

Whether a Writ of Certiorari may be properly granted to an applicant who cannot show that the decision of the court of appeals is in conflict with any decision of any other court nor that it has so departed from the usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

2.

Whether a Writ of Certiorari should be granted to an applicant who does not contest the substantive result in the court of appeals, where the only error alleged was a procedural one without effect on the outcome of the case, and where the benefits of the Writ, if granted, flow only to the applicant's counsel and not to the applicant herself.

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Rice v. Sioux City Cemetery, 349 U.S. 70 (1954). 9,10

RULES OF COURT:

Rules of the United States Supreme Court, Rule 17. . . . . 4,6, 9

Rules of the United States Supreme Court, former Rule 19 . . 9

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 10 (b) (4) 2

Rule 54 (b) 2

STATEMENT OF THE CASE

This action was filed by Jerry W. Kelly, plaintiff below and opponent herein and tried before the United States District Court for the Eastern District of Louisiana. The trial, by stipulation, was limited to the issue of liability and left the issue of quantum of damages for later determination.

On June 18, 1980, the Honorable Veronica D. Wicker entered Findings of Fact and Conclusions of Law and, on July 15, 1980, entered judgment in accordance with those Findings and Conclusions. That judgment cast Mrs. Dugas, defendant below and petitioner herein, in judgment to Jerry Kelly, but, due to the limitations upon the scope of the trial stemming from the stipulations upon which trial was had, did not assess damages. The judgment therefore constituted a partial judgment

upon the issues between the parties.

Counsel for the defendant, Mrs. Dugas, duly filed a Notice of Appeal, apparently having overlooked the provisions of Rule 54(b) of the Federal Rules of Civil Procedure. That Rule provides that partial judgments are not appealable, absent certain procedural formalities; it is undisputed that those formalities were not observed in this instance.

Mrs. Dugas's counsel wrote to the clerk of the court of appeals, requesting an extension of time in which to order the transcript of the record in the trial court. That letter did not arrive at the office of the clerk before that officer, acting pursuant to Rule 10(b)(4) of the Federal Rules of Civil Procedure, dismissed the appeal for want of prosecution.

Mrs. Dugas's counsel then filed a motion to reinstate the appeal so dismissed; that motion was denied by the court of

appeals. From that denial, Mrs. Dugas's counsel seek review by means of the instant application for a Writ of Certiorari. As admitted in that Application, they do not seek to alter the substantive result in the court of appeals; rather, they seek merely to have this court take jurisdiction, have the record sent up from the court of appeals, and then have this Court issue an order altering the grounds upon which the court of appeals's denial was entered. (Applicant's Petition at 6.)

No right or interest of Mrs. Dugas or of her father will be advanced by such a order. No additional avenue of review or additional opportunity in litigation will be afforded thereby.

SUMMARY OF THE ARGUMENT

The relief sought in Mrs. Dugas's application is inappropriate. The petition does not set forth any ground for the exercise of this Court's supervisory jurisdiction other than a mild preference for one ground of denial below over another. The petition is utterly bare of any suggestion that might comport with the requirements of Rule 17 of the Rules of this Court, where the grounds for discretionary review are set forth. A petitioner's preference is not among those grounds.

Even if the petition made out a case for discretionary review under Rule 17, the jurisprudence of this Court and of the other federal courts does not support an applicant's right to set up a jurisdictional defect when seeking review from a court which that applicant selected and

where there is no substantive benefit to the applicant.

Rather, the only exception to judicial estoppel that an applicant may plead to permit him or her to aver his own error of jurisdiction has been used solely where there has been a substantive result which would be reversed by a dismissal for want of jurisdiction. This Court has never recognized a need to reverse for want of jurisdiction below where that want of jurisdiction has been harmless error. No such trivial rule should be instituted now.

ARGUMENT

The petition sets forth no ground for the exercise of this Court's supervisory jurisdiction.

The grounds for the exercise of discretionary review by this Court are set forth in Rule 17 of the Rules of this Court, which provides in pertinent part:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for

> an exercise of this Court's power of supervision.

R. Sup. Ct. of the U.S., R. 17.

The substance of Mrs. Dugas's petition may be found in two paragraphs:

> In 1804 this court established the principal that a party may assign for error, the lack of jurisdiction in the court to which he has resorted. Capron v Van Noorden 6 U.S. (Z. Cranch.) 126 (1804). [Sic.]
>
> Counsel has no quarrel with the dismissal of his abortive appeal, but respectfully petitions the Court to grant such dismissal on the grounds of prematurity and/or lack of jurisdiction rather than for want of prosecution and failure to order the transcript.

(Applicant's Petition at 5-6.)

The first point does not constitute a ground for the exercise of discretion; rather, it pretends to provide a jurisprudential authority for the exercise that the applicant seeks. The second point no more provides a ground; rather, it is a reiteration of the applicant's prayer for the exercise of that discretion,

reasons for which are not shown.

Nowhere in the applicant's petition is there even a suggestion that the decision of the court of appeals in this case was in conflict with any decision of any other federal court of appeals. No more is there any suggestion that the court of appeals decided a federal question in a way in conflict with a state court of last resort; indeed, as jurisdiction below was founded in diversity of citizenship, there was no federal question of any sort raised before the trial court. Rather, the issues at trial were solely issues of Louisiana state law.

Again, there is no suggestion that the decision of the court of appeals in this case departed from the accepted and usual course of judicial proceedings in any particular, let alone so far departed as to invoke this Court's supervisory

jurisdiction. In fact, a dismissal by a court of a case lodged upon its docket and upon grounds set forth in mandatory terms in its rules is specifically and undeniably within "the accepted and usual course of judicial proceedings".

The criteria for "special and important reasons" for review under Rule 17 were set out in this Court's decision in Rice v. Sioux City Cemetery, 349 U.S. 70 (1954) (concerning the predecessor to the current Rule 17, old Rule 19):

> This Rule ... embodies the criteria ... by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925....
>
> ...
>
> A ... question raised by a petitioner may be "of substance" in the sense that, abstractly considered,

> it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations omitted.] "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.
>
> ...
>
> ... In the words of Mr. Chief Justice Taft, speaking for a unanimous Court:
>
> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarassing conflict of opinion and authority between the circuit courts of appeal." [Citations omitted.]

Rice v. Sioux City Cemetery, 349 U.S. 70, 73-79 (1954) [emphasis supplied].

The reasons advanced by the applicant herein are self-confessedly for the sole benefit of one party litigant, and without

significance of any sort for the public or for the development of the jurisprudence of this Court.

The error alleged in the petition was harmless error because even the grant of the relief sought would afford the applicant no substantive benefit and would work no change in her posture before the courts.

The applicant cites Capron v. Van Noorden, 6 U.S. (2 Cranch) 126 (1804) for the proposition that a litigant may raise on appeal a jurisdictional defect in a court to which the litigant himself chose to resort. (Applicant's Petition, at 5.) A review of that case, however, reveals that the petitioner there lost in the trial court and sought a reversal of the trial court decision. That reversal would necessarily reverse the positions of the parties after judgment,

conferring a substantive (and substantial) benefit upon the petitioner. The subsequent history of the Capron doctrine is ably reviewed in Mr. Justice Matthews's opinion in Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379 (1884). Notably, in each of the cases there listed in which the Capron rule was invoked to prevent a petitioner's application from being rejected, the petitioner in question stood to gain some substantive benefit from the denial of jurisdiction to the trial or intermediate appellate court. In other words, in each case the applicant lost his cause below and sought to reverse that loss through a declaration that the trial court lacked jurisdiction of the matter.

That is to be contrasted with the case at bar, where the petitioner admits that no substantive result will follow, but wishes this Court to work a trivial amendment to the record in the Court of

Appeals.

CONCLUSION

For the reasons set out above, Jerry W. Kelly, through undersigned counsel, respectfully prays this Court to deny the applicant's Petition for a Writ of Certiorari.

Respectfully submitted,

/s/ Ross P. LaDart
ROSS P. LaDART
3720 Westbank Expressway
Harvey LA 70058
(504) 347-6241

ROBERT J. SKINNER
2201 Veterans Blvd.
Metairie LA 70002
(504) 581-1711

CERTIFICATE OF SERVICE

I, ROSS P. LeDART, one of the counsel for Jerry W. Kelly, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 2nd day of March, 1981, I served copies of the foregoing Brief in Opposition to Petition for Certiorari on the Petitioner herein, by placing three (3) copies in the United States Mail, first-class postage prepaid, properly addressed to her attorneys of record:

J. Thomas Nelson, Esquire
Richard G. Vinet, Esquire
NELSON, NELSON & KOCH, LTD.
144 Elk Place, Suite 1202
New Orleans LA 70112.

Harvey, Louisiana, this 2nd day of March, 1981.

/s/ Ross P. LaDart
ROSS P. LeDART

ENTRY OF APPEARANCE

I, ROSS P. LeDART, a member of the Bar of the Supreme Court of the United States, do hereby appear in the matter entitled "Jacqueline Marcello Dugas, Petitioner, versus Jerry W. Kelly, Respondent", a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ROBERT J. SKINNER, a member of the Bar of the Supreme Court of Louisiana and of the Bars of the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit, from which this cause arises, is associated with me on this brief.

/s/ Ross P. LaDart
ROSS P. LeDART

CERTIFICATE OF FILING

STATE OF LOUISIANA)
) SS.
PARISH OF JEFFERSON)

I, ROSS P. LeDART, one of the attorneys for Jerry W. Kelly, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 2nd day of March, 1981, I deposited in a United States post office, located at New Orleans Louisiana, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Brief in Opposisiton to Petition for a Writ of Certiorari.

/s/ Ross P. LaDart
ROSS P. LeDART

Subscribed and sworn to before me, this 2nd day of March, 1981.

(S E A L)

/s/ J. A. Hollister
NOTARY PUBLIC